

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-1585 and 78-1681

STATE OF LOUISIANA,

Petitioner,

STATE OF TEXAS,

Petitioner,

VS

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF IN OPPOSITION FOR RESPONDENT
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK**

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
STATEMENT.....	2
REASON FOR DENYING THE WRIT	2
CONCLUSION.....	6

TABLE OF CITATIONS

PAGE

CASE

<i>California v. Southland Royalty Company</i> , 436 U.S. 519 (1978).....	2
--	---

ADMINISTRATIVE ORDER

<i>Public Service Co. of North Carolina, Inc.</i> FPC Docket No. RP76-103, Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandoning Authorization, and Denying Oral Argument (issued April 26, 1977) ..	3
--	---

STATUTE

Natural Gas Policy Act of 1978, 15 USC §3301, <i>et seq.</i> §§101, 105, 106(b).....	4
§§102, 103, 104, 601(a)(1)(b).....	5
Natural Gas Act, Section 7(b), 15 USC §717f(b) ...	3, 5

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STATE OF NEW YORK

The Public Service Commission of the State of New York (New York), a respondent herein and an intervenor in the case below, opposes the petitions for writ of certiorari filed by the State of Louisiana and the State of Texas to review the judgment of the United States Court of

Appeals for the Fifth Circuit in the above-captioned proceeding. The opinion of the Fifth Circuit is reported *sub nom. Public Service Company of North Carolina, et al. v. Federal Energy Regulatory Commission* at 587 F.2d 716 (1979).

QUESTION PRESENTED

New York adopts the question presented as framed by the Respondent Federal Energy Regulatory Commission (Commission) in its opposition to the petitions for certiorari in the above-captioned proceeding.

STATEMENT

The statement of the underlying facts in this case, as presented by the Commission in its opposition to the petitions for certiorari, is hereby adopted by New York as its statement of the case.

REASON FOR DENYING THE WRIT

New York believes that the opinion below, which is carefully restricted to its peculiar facts, is clearly valid in its own terms. Moreover, while we agree with the court below that affirmance of the Commission's decision is required under the rule laid down by this Court in *California v. Southland Royalty Company*, 436 U.S. 519, we are convinced that the Commission's decision was

independently supportable, and so argued to the Court of Appeals. We shall not, however, burden the Court with a detailed analysis of our views of the law since this would only duplicate the opposition to be filed by the government.

New York does wish to point out why, contrary to the petitioners, we believe no substantial question of public policy exists which would warrant grant of the petitions and plenary consideration of the case by the Court. While the State of New York is primarily a consumer of natural gas rather than a producer, we joined the petitioners in arguing before the respondent Commission that a state was not and could not become a "natural gas company" under the Natural Gas Act. The Commission so held¹ and the Court of Appeals did not disagree. All the court held is that where the state, as lessor, acquiesces in Commission certification of a sale of natural gas and its interstate transmission by a natural gas pipeline, the state cannot subsequently exercise rights to take the gas in kind for different disposition, in the absence of Commission authorization, pursuant to Section 7(b) of the Natural Gas Act, to abandon the certificated service.

This determination was of significance to both states of production, like the petitioners, and states of consumption, like New York, as long as the law, in the

¹*Public Service Co. of North Carolina, Inc.*, FPC Docket No. RP76-103, Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandoning Authorization, and Denying Oral Argument (issued April 26, 1977), p. 8.

absence of such a restriction, would have permitted the state lessor to withdraw gas from the interstate pipeline whenever it believed it could secure a better price by taking its royalty interest in kind and reselling it at a higher price than the lessee producer had secured from the interstate sale pursuant to the regulatory restraints of the Natural Gas company. However, the recent enactment of the Natural Gas Policy Act of 1978 (NGPA), Public Law No. 95-621, 15 U.S.C. §3301, *et seq.*, has drastically changed the legal situation and effectively removed the economic impetus for such withdrawals. Specifically, under the NGPA, sales of gas by states are now subject to the various price ceilings of Title I of the Act and these ceilings apply both to intrastate sales (See Sections 105 and 106(b)) and to direct sales, as well as sales for resale. (See Section 101(b)).

The result of these changes is to remove virtually all financial incentive for a state to attempt to withdraw its royalty share of gas previously dedicated to interstate commerce in order to resell this gas in what previously was the unregulated intrastate market or by way of a previously unregulated direct sale. Moreover, the NGPA, by eliminating the date of sales contract as the basis for determining the applicable rate and substituting therefore various fixed physical events or factors for determining the particular price category into which a sale falls, has removed any inducement to a state to withdraw gas from a previously certificated interstate sale in order to secure higher prices which might have been authorized for sales pursuant to contracts entered into after the date of the original certification.

Under these circumstances the Commission's ruling, as affirmed by the Court below, has no general significance even in the narrow but then important framework to which it was initially restricted.² In fact, since the gas in question in the particular case determined by the Commission was "committed or dedicated to interstate commerce" as of the date of enactment of the NGPA and a just and reasonable rate for the sale under the Natural Gas Act was in effect on such date, the ceiling price which the state lessor could receive for its royalty share under Section 104 of the NGPA is the same as the ceiling applicable to the sale by the lessee Superior Oil Company.

²Under Section 601(a)(1)(b) of the NGPA, the abandonment provisions of Section 7(b) of the Natural Gas Act will no longer apply to wells whose surface drilling commenced after February 19, 1977, which qualify for treatment under Sections 102 and 103 of the Act. This action undoubtedly reflects Congressional recognition that its elimination of the regulatory dichotomies between interstate and intrastate sales and between direct sales and sales for resale, had eliminated the financial impetus for sellers diverting gas from the service to which it had been initially committed.

CONCLUSION

The decision below is not only correct in its own terms but relates to a problem which has been rendered obsolete by subsequent legislation. The petitions for certiorari should be denied.

Respectfully submitted,

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THE PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK

June 26, 1979